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# The Advocate

The Advocate, Fordham Law School

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# The Advocate

## FORDHAM LAW SCHOOL

VOL. 19 NO. 3

DECEMBER, 1986

### Wormser? Lovett!

On Oct. 30, 1986, the four finalists of the Wormser Moot Court Competition presented oral arguments before the Hon. Kevin Thomas Duffy, U.S. District Judge for the Southern District of New York, the Hon. Thomas Collier Platt, U.S. District Judge for the Eastern District, and the Hon. Michael H. Dolinger, U.S. Magistrate for the Southern District. Over 100 spectators attended.

This year's Wormser problem involved a first amendment defense to a religious fraud action and a plaintiff's attempt to pierce the corporate veil of a series of parents and subsidiaries engaged in the instruction and sale of materials for a religious ceremony. The following students were selected to receive competition honors by the judges and brief graders (friends and alumni of the school):

Best Speaker and Competition Winner—Stephen Lovett

Writers of the Best Brief—Lindsay Lankford and Tom Koger

Finalists—Maura McInerney, Lou Craco and Stephen Fitzgerald

Semifinalists—Virginia Ampe, Tom Koger, Kevin Galvin, Mark Schirmer and Barbara Flynn.

Quarterfinalists—Lindsay Lankford, Nancy Delaney, Maryanne Dickey, Thomas Reilly, Leo Carr, Terry Yard and Gilbert Mestler.

The quarterfinalist (top 16) grades ranged from 84.248 to 90.875. Average brief grade before penalties—82.41 (with penalties—81.61). Average overall grade—81.89

The Board would like to congratulate all 96 students who completed the competition. The grades were particularly close with over 40 students within 3 points of the top 16 cutoff.

The Moot Court Board wishes to express its gratitude to the 62 judges and attorneys who have contributed their time and efforts to judging oral arguments and grading briefs and to Callahan & Co. for their generous donations of law books for the winners.

But you are not limited to finance. If you choose marketing, there is a whole body of copyright and trademark law that complements it. The point is that the combinations are surprising, and it is amazing how well one school complements the other.

Some students consider the additional credentials superfluous. "I don't need that, I'm going into litigation," is the skeptics reply. My rejoinder is that much litigation is corporate, and on the issue of damages alone a familiarity with stock valuation models or the mathematics of net present value could prove invaluable. Of course, you would still need to bring in expert witnesses, but think how much more cogent would be your presentation to the court. Moreover, one trained in the mathematics of business is much more likely to catch statistical discrepancies or flawed analyses than one who is not. Finally, the individual trained in business has a definite advantage at the negotiating table. Because much of litigation is spend in negotiation, these people should make better litigators.

I have related something about how a business degree can aid you in your legal career, but there is a flip side to the coin. A degree from Fordham Law School is not resume-filler. It is viewed as a highly respected accomplishment by the business community. Ask Ned Doyle, founder of The Doyle, Dane and Bernbach advertising agency. Also, based on a *Fortune* survey of the nations 500 largest industrial and 300 non-industrial corporations (including banks, insurance firms, retailers, etc. . . .), the main career emphasis of corporate chief executives breaks down as follows:

|           |     |
|-----------|-----|
| Marketing | 28% |
| Finance   | 26% |
| Legal     | 14% |

\*Source: Charles G. Burck, "A Group Profile of the Fortune 500 Chief Executive," *Fortune*, May, 1976.

Of course, a joint degree does not assure your ascent of the corporate ladder, but combining degrees does improve your marketability.

How do you obtain a joint degree? The J.D./M.B.A. program is designed for full-time students and enables a student to complete the requirements for both degrees in four years rather than five. You must apply to, and be accepted by, each school independently. That means you must take the GMAT. But once admitted your requirements for both schools change. The law school will allow 14 business credits towards its 83 credit degree. The business school will allow 122 law credits to the 54 required for its degree. But you must complete all core requirements for both schools.

Normally, you complete your first year at the law school. Second year is spent wholly at the business school. Year three involves both schools, and your final year is at the law school.

Two corollary issues deserve comment: 1) The math requirement, and 2) The quality of Fordham's business school. Mathematics, the law student's bane. Most law students admit to a strong aversion for mathematics; they prefer averments to averages. And business school does require some mathematical background. Basic statistics and calculus are requirements for degree conferral. But you are not required to be a statistician or mathematician. Much of the work merely requires interpretation of results. You need to know some algebra, but nothing advanced; if you can understand graphs and work with ratios, you should have no problem.

Finally, perhaps most importantly, I am impressed with the people at Fordham's Martino Graduate School of Business. The professors are excellent. I highly recommend Dr. Frank Wener for Finance. Professor Wener's pedagogy titillates the mind; his classes are always invigorating and challenging. He is always there for the student, ready to explain anything that is unclear. Professor James A.F. Stoner's class on Management is also excellent. Dr. Stoner invites class participation. His in-class simulations prepare the student for the politics of business. The reading is

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## Fordham JD/MBA

by Brian Dignan

Law and business are inextricably bound. Much of what lawyers do involves business, and business must always operate within the confines of the law. From forming a corporation to filing under Chapter 11, law and business go hand in hand. A consequence of this symbiosis is the demand for individuals proficient in both fields. In recent years the concept of a dual or joint degree has gained increasingly in popularity among both the legal community and the business profession. For this reason, and to meet the demand for these individuals, last year Fordham inaugurated its J.D./M.B.A. program.

As participant in the program, I am happy to report that it has met with resounding success. While some continue to doubt the efficacy of a joint degree, the

majority of the feedback has been overwhelmingly positive. For example, last year the firm of Cravath, Swaine and Moore offered a \$10,000 bonus for incoming associates with an M.B.A. Other firms have followed.

What does one do with a combined degree? It is really up to the individual. Depending on your likes and interests, you can tailor your degrees (I say degrees because you are actually awarded two separate diplomas, one from each school) to meet any need. If you major in finance in the business school, you could easily pursue any of the finance courses offered in law school: Corporate Finance, Commercial Financing, Real Estate Financing. Moreover, a degree in finance will better prepare you for courses where accounting, tax, and financial considerations play an integral role in understanding substantive issues.

IN THIS ISSUE. . .

ENTERTAINMENT LAW SPECIAL

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# The Advocate

## FORDHAM UNIVERSITY SCHOOL OF LAW

The Advocate is the official newspaper of Fordham Law School, published by the students of the school. The purpose of the Advocate is to report news concerning the Fordham Law School Community and developments in the legal profession, and to provide students with a medium for communication and expression of opinion.

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## EDITORIAL

The ADVOCATE congratulates the SBA for producing a copy of the constitution. We urge SBA to place several copies on reserve in the library, make copies available to students upon request and include it as an appendix in future student handbooks.

With these few measures can begin the re-enfranchisement of a student body hitherto accused of apathy. Perhaps the apparent lack of interest demonstrated by some students is better described as inaction due to disorganization. SBA has taken a first step toward the fulfillment of the potential of Fordham Law students.

We urge all students to get a copy of their constitution and familiarize yourselves with it. Use it to better our scholastic community, increase our involvement in the profession and make our elected representatives, officers and organizations accountable to the students they represent.

**But. . .**

The manner in which SBA chose to perform this task is unfortunate. The personal attack on Mr. Cherone accompanying publication of the document is uncalled for and constitutes conduct unbecoming the elected representatives of our student body.

Mr. Cherone explicitly stated in his article published in the November ADVOCATE that he asked SBA officers for a copy of the document. Other representatives of the ADVOCATE also requested copies on many occasions during the first half of this semester. All of our requests were met with empty promises.

The motives for SBA procrastination on this matter are unclear, but SBA should clarify any insinuations that Mr. Cherone acted negligently or with disregard for the truth and be prepared to substantiate any accusations.

The ADVOCATE hopes that we may all set our differences aside and kindle a spirit of cooperation among members of the student body. We again invite SBA, organizations and students to use our pages to apprise our community of their functions and aspirations.

### Pro Bono

The November ADVOCATE carried several articles about the need for lawyers and law students to provide *pro bono* legal services to the poor elderly and handicapped. While Congress cuts funding, many less fortunate people go without adequate representation. Aid to the needy may take many forms. The practicing attorney may join the Legal Aid Society or donate a portion of his time or money. Students might donate time to help public interest groups.

Unfortunately, public interest organizations do not pay their full time personnel very well, and students are usually volunteers. The costs of law school and living in New York often make volunteer work impracticable.

Last year, then SBA Pres, Stephen Mitchell tried to organize an income sharing program here at Fordham. The idea was to convince students to donate a portion of their salaries to a fund out of which students donating time to public interest groups would be awarded weekly stipends to defray travelling and meal costs.

The proposal was defeated. Unfortunately Mr. Mitchell attempted to create a mandatory program. The ADVOCATE supports a voluntary system whereby students and alumni may donate if they so desire. Such a program is an opportunity for students to fulfill our professional responsibility to society. Please consider the proposal.

## Sympathies

We are sorry to report the death of Dr. Norman Higinbotham, the father of Dean Linda Young, on November 12, 1986. Our sympathies to Dean Young and her family.

Professor Robert A. Kessler, at Fordham since 1957, suffered a stroke in November. His condition is stable. We wish Professor Kessler a speedy recovery.

Professor Kessler has authored numerous works on Corporations and has taught Agency, Partnerships and Corporations, Small Business Planning, and Securities Regulation. He graduated from Yale University in 1949, received his J.D. from Columbia in 1952 and was awarded a LL.M. by New York University in 1959.

## Paris Clinicals

The University of San Diego Law School will add a clinical placement in international business law to its Paris summer program this year. This program gives second-year students the opportunity to work in Paris law firms and corporate counsel's offices specializing in EEC law, international financial law, and international business law in general. Most of the placements will last for six weeks and carry academic credit.

The student's work will depend on the kind of legal problems available in the office assigned. Students can expect to do research and draft contracts, opinion letters, and memos. They may participate in client interviews, negotiating sessions, and firm strategy planning meetings.

Current first year students who wish to participate summer 1988 should contact USD this year for counseling.

The Paris program is one of 6 summer programs offered by USD. The others are Dublin on international human rights, London on international business, Mexico on law of the Americas, Oxford on non-business Anglo-American comparative law, and Russia-Poland on east-west trade and socialist law. For further information, write Mrs. Sue Coursey, USD Law School, Alcalá Park, San Diego, CA 92110.

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1. All copy must be TYPED and DOUBLE-SPACED.
2. Deadlines will be approximately the FIFTEENTH of each month. Specifics will be posted.
3. Submission does not guarantee immediate publication. The editors reserve the right to reject or edit copy at their discretion.

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# Entertainment Law Special

## Casenotes

### Drug Tests

The Third Circuit Court of Appeals has upheld the theory that random drug tests on jockeys do not represent an invasion of their privacy. *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

The ruling supported regulations adopted by the New Jersey Racing Commission that permit the State Racing Steward to direct any official, jockey, trainer, or groom to submit to breathalyzer and urine testing to detect alcohol or drug consumption.

The New Jersey Racing Commission argued that the tests were needed in order to protect the jockey's safety on the track.

While the safety of the participants may be protected by pre-event testing, the results of a urine test are not known before the event. Nevertheless, the Third Circuit held that urine tests of jockeys were justified to protect the appearance of integrity in the racing industry because of the public wagering on the outcome of the races.

### Video

by Wallace E.J. Collins III

The Third Circuit Court of Appeals has held that videocassette stores may not rent private screening rooms to customers. *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986). The practice infringes on the exclusive right of motion picture studios to "authorize" the public performance of copyrighted motion pictures.

This case originated in 1984 when ten major motion picture companies filed suit for lost royalties against Aveco, Inc. and John Leonard, owner of Nickelodeon Video Showcase, a video store that included video viewing parlors. The studios, as owners of the copyrights in the motion pictures, possess the exclusive right under the Copyright Act of 1976, 17 U.S.C. Sec. 106, to authorize the public performance of the works and claimed that the video store infringed on this right.

The Court held that watching the videotapes in a rented room—ranging in size from a one-person booth to a small lounge—constituted a public showing.

The Court noted that the Copyright Act speaks of performances at a place open to the public, it does not require that the public place be actually crowded with people. Simply because the videos can be viewed in private does not mitigate the essential fact that the parlor is unquestionably open to the public: "[a] telephone booth, a taxi cab, and even a pay toilet are commonly regarded as 'open to the public' even though they are usually occupied only by one party at a time."

The defendant argued that his viewing parlors did not violate the Copyright Act because the video store did not actually screen the movies; customers had complete control over the VCRs placed there for their use. The Court disagreed with that defense, saying that video parlors indirectly "authorize" the showing of the movies by knowingly renting the rooms for that purpose.

### Beatles

by Renee Hill

Last summer the California Superior Court awarded the Beatle's record and holding company, Apple Corps. Ltd., nearly eight million dollars for the "massive appropriation" of the Beatle's right of publicity by the creators and producers of the stage and show and film "Beatlemania". *Apple Corps. Ltd. v. Leber*, 32 Pat. Copyright Journal 141 (BNA). The right of publicity involves the right of celebrities to control and profit from the exploitation of their names, likenesses, and fame. See *Haelan Laboratories v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953).

Beatlemania was a stage show created by defendant Steve Leber consisting of Beatles' imitators performing the group's songs to a mixed media background and a foreground of slides and movies depicting the sixties. A Beatlemania film was also produced.

*Apple Corps. Ltd. v. Leber*, was initiated in 1979 for invasion of the Beatle's right of publicity and unfair competition.

The court applied New York Civil Rights Law Sections 50 and 51 which prohibit the unauthorized use of a person's name, portrait or picture for trade or advertising purposes. Unauthorized use is permissible if the use involves newsworthy events or matters of public interest.

Unauthorized use is permissible, if the use involves newsworthy events or matters of public interest.

The defendants argued that "Beatlemania" offered an historical overview of the 1960's by including multi-media presentations which contained social and political

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## Dead Kennedys

by Michael B. Ackerman

Last December, Mary Sierra's fourteen year old daughter bought an album for her eleven year old brother. This was one of more than a million record purchases that month. However, this was no run of the mill purchase and certainly no ordinary album.

The album was called "Frankenchrist," by a California band called the Dead Kennedys. The album carried a warning sticker which told consumers that included in the package was a "work of art . . . that some people may find shocking, repulsive, or offensive. Life can sometimes be that way." The work of art was a 24 inch poster created by H.R. Giger called "Penis Landscape." Offended yet? Good. The painting depicted genitalia in sexual contact. How about now, are you offended yet?

Mary Sierra was so offended that she sent the poster, along with a complaint to the State Attorney General's office. The material was forwarded to the Los Angeles plainclothes police searched the apartment of lead singer Jello Biafra (name used to protect the innocent; real name: Eric

Boucher). Biafra is also the owner of Alternative Tentacles Records, which is the Dead Kennedys' label.

Biafra, Michael Bonnano (former label general manager), Debra Ruth Schwartz (general manager of Mordam Records, a regional subdistributor), Steve Boudreau (president of Greenworld Distributors, an independent label distributor), and Salvatore Alberti (of Alberti Record Manufacturers, the firm that assembled the album package) were all charged on June 3 with one count of misdemeanor violation of Section 313.1 of the California Penal Code forbidding distribution of "harmful material" to minors. If convicted the defendants face a maximum penalty of a year in jail and a \$2,000 fine.

In an interview with *Billboard* magazine Biafra said, "The beauty of the [Giger] painting is its depiction of the putrefaction [sic] of our consumer culture. If we thought it was harmful or exploitative we never would have used it to begin with."

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## Parody and Fair Use

by Michael R. Graham

Entertainment, media and advertising executives, attorneys, and creative workers have cause for cautious celebration. It appears that the federal courts have called a truce in the war between various fair use and parody analyses, and agreed that the benchmark is economic analysis of the potential effects of works which utilize elements of one work to create parody.

It has never been simple to predict when a court will hold a parody immune from attacks of irate authors whose work is lampooned or made the source of parody. On the one hand, even Woody Allen's little-understood masterpiece "Love and Death" could be held to infringe on the works of Tolstoy and Dostoevsky, since it is an obvious burlesque of parts of several of their works. On the other hand, one district court held the verbatim use of 300 words from President Ford's memoirs was not an infringement. Because until recently there has been little predictability in the courts' decisions, important creative works have been forced into oblivion, or never created at all.

One case in point is that of the Wooster Group's tour de force, "L.S.D. (. . . Just The High Points . . .)." In that work, one of America's pre-eminent experimental theatre groups deconstructed Arthur Miller's "The Crucible" as part of an unnerving and hilarious examination of the Sixties' drug culture, Timothy Leary, and artistic responsibility. Miller objected, threatened a lawsuit for infringement, and the group closed the production. The Wooster Group's attorney had an idea that the work should be protected as an independently creative work. But the play did not fit nicely into the definition of a parody, and even if it did, some courts have held that even that time-honored literary form is subject to strict rules against verbatim copying.

Since literary and artistic works often borrow from earlier works to create new works and to contrast forms or shock through juxtaposition, this problem is latent in many more works than become the center of cases in parody law. It is even more a problem for the many new collage

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# Parody

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forms of literary and visual art. It appears, however, that two Supreme Court decisions have clarified and made more predictable this area of law, and this interpretation is borne out by recent cases in the Second and Ninth Circuits. At the same time, tension remains between those who believe that the rights afforded by copyright should be more or less absolute and those who believe that the constitution mandates limited protection based on a policy encouraging creation and the development of the arts.

While the question of an author's moral rights in his works is of growing interest and puts in doubt the traditional interpretation of the constitution's copyright clause as protecting society's interest in artistic development at the expense of individual monopolization of creative works, the present "state of the art" of parody defense appears to offer broader protection than it has in the past. To understand the scope of this protection, and be able to apply it for clients in the creative arts, it is important to understand the constitutional basis of copyright law, the substance of the fair use defense, and the history and current state of the parody fair use defense. This article attempts to present a brief survey of these topics, and offers reference to some of the many interesting and insightful works dealing with them.

## A. American Copyright Law and Fair Use

American copyright law embodies a unique paradox of constitutional law. On the one hand, the Constitution empowers Congress to "promote the Progress of . . . the Arts by securing for limited Times to Authors . . . the exclusive Right to their respective Writings."<sup>1</sup> On the other hand, the First Amendment proscribes Congress from making any law "abridging the freedom of speech."<sup>2</sup> This paradox can be understood as creating two types of writings: those protected by the First Amendment, and those not protected.<sup>3</sup>

The Copyright Act of 1976 [hereinafter "the Act"] fulfills the constitutional charter, granting creators of original works specific exclusive rights in their works. However, these rights create only a limited monopoly for the creator to control the reproduction, derivative use, distribution, performance, and display of the work.<sup>4</sup> In construing the role of copyright law, the Supreme Court has stated that "[t]he economic philosophy behind the [copyright] clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare."<sup>5</sup> The intent underlying American copyright law is "to secure a fair return for an author's creative labors, and the ultimate goal is to stimulate artistic creativity for the general public good."<sup>6</sup> Thus, American copyright law encourages artistic creation and innovation by granting authors limited monopolies in their works in order to realize financial gain. The limited constitutional grant focuses upon

the good of society, not upon the noneconomic interests of authors. It follows that when an artist utilizes another author's work or words, if the use is productive and furthers artistic or cultural growth, that use should be permitted unless it threatens the economic incentive of the other.

Shortly after the enactment of the first copyright law, the courts recognized that the copying of elements of original works might be part of an independent creation deserving immunity from the monopoly granted by copyright.<sup>7</sup> As Professor Chaffee put it, "A dwarf standing on the shoulders of a giant can see farther than the giant himself."<sup>8</sup> ("Reflections on Copyright Law") The result was the development of a "fair use" defense to infringement.<sup>9</sup> Certain types of works were considered to advance the arts despite or through their use of portions of original works. These included criticism, commentary, and news reporting.<sup>10</sup> However, since every fair use inquiry is fact-specific, determining whether a specific use is "fair" is one of the most difficult inquiries of copyright law.<sup>11</sup>

The fair use doctrine is a rule of reason fashioned by Judges to balance the competing interests of the author's right to compensation for his creative endeavors and the public's interest in the widest possible dissemination of ideas and information.<sup>12</sup>

Although no single definition of fair use has been accepted by the courts, the most frequently quoted definition is that fair use is that it is "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the [copyright] owner."<sup>13</sup> Thus, it "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."<sup>14</sup> However, fair use has been characterized as stopping short of allowing verbatim copying<sup>15</sup> except in the area of criticism and commentary.

This judge-made rule was codified as section 107 of the 1976 Copyright Act. That section provides "the fair use of a copyrighted work . . . for purposes such as criticism, comments, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."<sup>16</sup> Section 107 then defines four factors to be considered in determining whether use is "fair":

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The conflict recently resolved concerned the weight to be given these elements in a fair use analysis especially those of substantiality of use and effect on potential market. Thus, a brief overview of these factors is necessary to understand the parody doctrine and fair use.

## 1. The purpose and character of the use.

This factor first focuses upon the purpose for which the work is being used. If the purpose falls within one of the traditionally protected areas of news reporting, education, or criticism,<sup>17</sup> the use is presumed to be fair.

If it is not, focus is directed to whether the new work is a "productive use"<sup>18</sup> in the sense that the copier had engaged in "creating a work of authorship whereby he adds his own original contribution to that which is copied."<sup>19</sup>

Many courts have granted more weight to whether the use made of a copyrighted work is commercial in nature or nonprofit.<sup>20</sup> "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."<sup>21</sup> However, where the purpose of a work is both to make money and to facilitate access by the public to information or to create an independently creative work, the fact that there may be some profit motive does not preclude there being fair use.<sup>22</sup>

## 2. The nature of the copyrighted work.

This factor focuses upon whether the copyrighted work is one entitled to broad or narrow copyright protection.<sup>23</sup> Considerations of the degree of protection to be afforded a specific work include the amount of original effort that went into the work and the degree to which the author should have expected his writings to be used in other works. The courts are less likely to accept fair use claims where the infringing work is in the same medium as the original.<sup>24</sup>

## 3. The amount and substantiality of use.

While this third factor is the focus of the Ninth Circuit's "conjure up" test<sup>25</sup> it is actually a consideration subsumed by the initial determination of whether there has been an infringement, and should not enter into the fair use analysis.<sup>26</sup> The factor requires a determination of both quantitative<sup>27</sup> and qualitative substantiality.<sup>28</sup> The inquiry is into "whether the similarity relates to matter which constitutes a substantial portion of [the] plaintiff's work."<sup>29</sup> Although very little taking is required for a court to find an infringement,<sup>30</sup> this factor alone should not be dispositive of fair use.

## 4. The effect of the use on the potential market for or value of the copyrighted work.

This factor raises more than merely the question of the extent of direct damages an author may suffer because of the activities of the user.<sup>31</sup> In determining the effect the user's work may have upon the potential market or value of the original work, the courts consider whether a subsequent use would adversely affect the value of any of the rights an author enjoys in the copyrighted work. If so, the use is not considered fair even if these rights have not been exercised by the original's author.<sup>32</sup> Thus, if a work impairs an author's ability to license or prepare derivative works, sell movie or ancillary rights, or otherwise profit from his work, it would not be a fair use.

Another consideration is whether the subsequent work would have the effect of supplanting the original by "fulfilling the demand for the original."<sup>33</sup> In *Berlin v. E.C. Publications, Inc.*, the Second Circuit held that references to the music of Irving Berlin in *Mad* magazine constituted a possible infringement. However, it held that this was fair use insofar as the lyrics included in the magazine were satirical versions which did not fulfill the demands of the originals.

Finally, the Supreme Court has stated that the possible economic effect must also be considered in terms of the effect of the challenged use if it should become widespread.<sup>34</sup>

## B. The Parody Fair Use Analysis

The real difficulty in determining whether a specific use of a copyrighted work is a fair use lies in determining the weight to be given to the various fair use factors. Since copyright is an equitable action, and fair use under either the Copyright Act or common law copyright is founded on judicially developed law, actions are fact-specific and judges have applied these factors on an ad hoc basis. Thus, there has traditionally been very little predictability in such defenses. It appears, however, that emphasis in all fair use cases must now be put on the effect of the challenged use upon the value of or the potential market for the copyrighted work.<sup>35</sup> In addition, parodies may assimilate at least enough of the source work to conjure-up that work and may even utilize verbatim passages.<sup>36</sup> This predictability has developed in only the last three years, however, and may still be subject to judicial fiat.

The current Parody defense arose out of a conflict between tests developed by the Ninth and Second circuits, and has been as unpredictable as any area of fair use.<sup>37</sup> In the first modern parody case, *Loew's Inc. v. Columbia Broadcasting System*,<sup>38</sup> the Ninth Circuit affirmed a district court's holding that since parodies were not among the established areas of fair use, the television parody of the motion picture "Gaslight" was "to be treated no differently from any other appropriation. . . . [I]f it is determined that there was a substantial taking, infringement exists."<sup>39</sup> In *Columbia Pictures Corp. v. National Broadcasting Co.*,<sup>40</sup> the same district judge determined that parody is a protectible form and "[s]ome limited taking should be permitted" in order to permit the parodist to "conjure up" the original work for humorous effect.<sup>41</sup> However, the court also noted that there was "no substantial similarity" between the burlesque ("From Here to Obscurity") and the source work ("From Here to Eternity").<sup>42</sup>

The "conjure up" or "substantially of taking" test limited the amount of work which could be appropriated for parody to that which was necessary to recall the original work. Thus, the Ninth Circuit in *Walt Disney Productions v. Air Pirates*<sup>43</sup> declared that the fair use defense would not be applied to permit "copying that is virtually complete or almost verbatim." A parodist could not take more than is absolutely

see p. 7



necessary and was not entitled to create "the best parody possible."<sup>44</sup> Thus, the use of recognizable Disney characters in a bawdy, obscene poster was held to be an infringement.

The Second Circuit adopted the "conjure-up" test in *Berlin v. E.C. Publications, Inc.*,<sup>45</sup> emphasizing that "parodies and satires are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism."<sup>46</sup> The court reminded that part of the inquiry, however, must be the economic effect of the parody:

[W]here, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper.<sup>47</sup>

Since Berlin had failed to "indicat[e] with any degree of particularity the manner in which [economic] injury might have been inflicted,"<sup>48</sup> no infringement could be found.

This "reasonableness of taking" or "economic effect" test was extended in *Elsmere Music, Inc. v. National Broadcasting Co.*,<sup>49</sup> in which the Second Circuit held that the "conjure up" test was a recognition of the parodist's need to utilize elements of the original, and not a limitation: "Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary."<sup>50</sup> Thus use of four bars of music from the "I Love New York" jingle for the Saturday Night Live parody, "I Love Sodom" was held to be fair. Although that court seemed to have taken a backward step in *MCA, Inc. v. Wilson*,<sup>51</sup> holding that the song "Cunnilungus Champion of Company 'C'" was not a parody of the Andrews Sisters' "Boogie Woogie Bugle Boy of Company 'B'", that case, like *Air Pirates*, can better be understood as judicial reaction to the obscene nature of the parody.<sup>52</sup>

The Supreme Court finally entered the fray in *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>53</sup> considering the fair use doctrine for the first time. The Court held that a fair use analysis must focus primarily on the economic impact of the challenged user. The Ninth Circuit had held that "the real purpose of the copyright scheme is to encourage works of the intellect, and . . . this purpose is to be achieved by reliance on the economic incentives granted to authors and inventors by the scheme."<sup>54</sup> Balancing the social value of the use of videocassette recorders to "time shift" with the effect of this substitution for televised motion pictures, the Supreme Court held that the lack of any real threat of economic detriment to the copyright holders precluded holding Sony liable as a contributory infringer.<sup>55</sup> More importantly, the Court noted that the lack of economic threat overcame the presumption that verbatim taking cannot be fair use.<sup>56</sup> While this decision may lack internal consistency, it heralded a return of fair use considerations to the utilitarian basis of copyright law.<sup>57</sup>

In *Harper & Row Publishers v. Nation Enterprises*,<sup>59</sup> the Supreme Court overturned a Second Circuit decision in which the unauthorized adoption of and reprinting of 300 words from the memoirs of President Gerald Ford was held to be fair based on the insubstantiality of the taking.<sup>59</sup> The Court adopted Nimmer's conclusion that "[f]air use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied."<sup>60</sup> Thus, when "the existence of a casual connection between the infringement and a loss of revenue" can be established with reasonable probability, "the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression."<sup>61</sup> Actual damages need not be shown. Instead, it is sufficient to show that if the challenged use "should become widespread, it would adversely effect the potential market for the copyrighted work."<sup>62</sup> Because publication of the material in *The Nation* resulted in the loss of a contract for first serial rights with *Time* magazine, the Court held that the plaintiff had met his burden and the defendant's use had not been fair.<sup>63</sup> The Court noted that the effect a subsequent use has upon the market for the original is "the single most important element of fair use."<sup>64</sup> Interestingly, this comports with the earliest American fair use case, *Folsom v. Marsh*,<sup>65</sup> in which the court held that infringement would be found only "[i]f so much is taken, that the value of the original is sensibly diminished, or the labors of the original are substantially to an injurious extent appropriated by another."<sup>66</sup>

However, this renewed emphasis was not immediately addressed by the battling circuits, and the Supreme Court's economic harm analysis was first applied to parodies in two cases in the District Court for the Northern District of Georgia. In *Pillsbury Co. v. Milky Way Productions, Inc.*,<sup>67</sup> the court held that, although the defendant's portrayal of Pillsbury's "Poppin Fresh" and "Poppie Fresh" engaging in sexual intercourse violated state anti-dilution laws, the lack of any evidence of economic harm precluded the copyright claim.<sup>68</sup>

[T]he fact that the defendants used more than was necessary to accomplish the desired effect does not foreclose a finding of fair use. . . . In this circuit all four factors must be considered together. . . . Special emphasis, however, is placed on the fourth factor. The plaintiff's failure to show any appreciable harm to the potential market for or the value of its copyrighted works bear significantly upon the relative fairness of Milky Way's unauthorized use of these copyrighted works.<sup>69</sup>

The Georgia District Court also applied an economic effect analysis in *DC Comics Inc. v. Unlimited Monkey Business*,<sup>70</sup> holding that the parody of "Superman" and "Wonderwoman" as "Super Stud" and "Wonder Wench" by a singing telegram service constituted infringement. The takings were substantial and there was great potential for commercial substitution, and hence economic damage.<sup>71</sup> The final blow was the Court's determination

that "[d]efendants do not engage in critical comment that constitutes part of the 'free flow of ideas' underlying the doctrine of fair use. Instead, they seek to augment the commercial value of their own property by creating new, and detrimental associations with plaintiff's property."<sup>72</sup>

The Second Circuit eventually reaffirmed its use of the economic harm model in *Warner Brothers v. American Broadcasting Co.*<sup>73</sup> There, the court denied the plaintiff's claim that the use of parody of Superman in the television program "The Greatest American Hero" was an infringement. While the court found evidence of some taking, it had been "use[d] as a springboard to create an independent intellectual property."<sup>74</sup> The district court granted summary judgment for the defendant<sup>75</sup> and the Second Circuit affirmed, reiterating the constitutional basis for the parody defense:

The 'parody' branch of the 'fair use' doctrine is itself a means of fostering the creativity protected by the copyright law. It also balances the public's interest in the free flow of ideas with the copyright holders' interest in the use of his work.<sup>76</sup> The use of copyrighted material will not, however, be protected when it is merely appropriated to promote the sale of commercial product.<sup>77</sup>

Use of parody to create an independently creative work was therefore held to be protected.

The District Court for the Southern District of New York recently went so far as to apply a parody analysis in an action brought under the Lanham Act and New York's unfair competition law, *Universal City Studios, Inc. v. The T-Shirt Gallery, Ltd.*<sup>78</sup> Judge Sprizzo held that a "Miami Mice" t-shirt was an obvious parody of the television show "Miami Vice." The obviousness of the parody, wrote Sprizzo, "highlights the differences between the two products,"<sup>79</sup> thereby decreasing any likelihood of confusion.

Finally, the conflict between Second Circuit and Ninth Circuit parody analysis appears to have been settled. In two parody cases just out of the Ninth Circuit, that Court of Appeals abandoned the "conjured up" test. In *Fisher v. Dees*, the court rejected the "rigid view" that the substantiality factor requires that no greater amount of a work be appropriated than is necessary to "evoke only initial recognition in the listener."<sup>80</sup> Holding that the parody "When Sonny Sniffs Glue" did not infringe "When Sonny Gets Blue," the Court affirmed that the economic factor "is undoubtedly the single most important element of fair use."<sup>81</sup> It also outlined the means for applying this element to parody:

[T]he economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original—any bad review can have that effect—but rather whether it fulfills the demand for the original. Biting criticism suppresses demand; copyright infringement usurps it. Thus, infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable.<sup>82</sup>

This song, at least, was held to be "a parody deserving of fair use protection as a matter of law."<sup>83</sup>

In its controversial decision in *Hustler Magazine, Inc. v. Moral Majority, Inc.*,<sup>84</sup> the Court of Appeals for the Ninth Circuit held that, consistent with *Betamax* and *The Nation*, fair use is not precluded by verbatim or wholesale use, but must emphasize the potential of economic impact or the lack thereof.

Hustler magazine published a parody of the well-known "First Time" Campari liquor advertisements, in which Jerry Falwell described his first time as being incest with his mother. Falwell filed a libel and emotional distress action in the Fourth Circuit, and included copies of the parody in mailings seeking funds for the litigation. Hustler brought suit claiming copyright infringement. The Court of Appeals held the use to be fair since it was not only designed to make money, but "to rebut the personal attack"<sup>85</sup> and to "make a political comment on pornography." Emphasizing that "the republication did not diminish the initial sales"<sup>86</sup> of that issue of the magazine in which the parody appeared, the court held there was no competition with the original and therefore fair use was appropriately found.<sup>87</sup>

It now appears clear that the economic effect test has been universally accepted as the primary consideration in parody fair use analysis. While application of the fair use doctrine always requires an ad hoc, factual analysis, in applying the four required factors, courts must henceforth place emphasis on whether a challenged work has the potential to have an adverse economic effect upon the author's source work. Combined with the general policy favoring productive use, this emphasis provides the appropriate constitutional balancing of the copyright owner's economic interest in his work with society's interest in the progress of the arts.

#### NOTES

<sup>1</sup> U.S. Const. Art. I, sec. 8, cl. 8.

<sup>2</sup> U.S. Const. amend. I.

<sup>3</sup> See D. Goetsch, *Parody as Free Speech—The Replacement of The Fair Use Doctrine by First Amendment Protection*, 3 W.N. Eng. L. Rev. 39 (1980).

<sup>4</sup> Section 106 of the Copyright Act of 1976, 17 U.S.C. §106 (1982).

<sup>5</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

<sup>6</sup> *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932), quoted in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 104 S. Ct. 774, 783 (1984).

<sup>7</sup> See Z. Chaffe, *Reflections on the Law of Copyright*, 45 Col. L. Rev. 503 and 718 (1945).

<sup>8</sup> *Id.* at 511.

<sup>9</sup> *Id.*

<sup>10</sup> 17 U.S.C. §§ 107–114.

<sup>11</sup> "[T]he issue of fair use . . . is the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

<sup>12</sup> *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980), citing Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 ASCAP Copyright L. Symp. 43, 51 (1971), quoting Latman, *Fair Use of Copyrighted Works* 5 (Sen. Comm. on Judiciary Study No. 141960).

<sup>13</sup> *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967), quoting Ball, *The Law of Copyright and Literary Property*, 260 (1944).

<sup>14</sup> *Iowa State Univ. Research Fund, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).



# Dead

from p.5

**Relevant Law** Sec. 313.1 of the California Penal Code:

Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes to or sends or causes to be sent to, or exhibits to, or offers to distribute or exhibit any harmful matter to a minor, is guilty of a misdemeanor.

Sec. 313 of the California Penal Code: Definitions

a) "Harmful matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without social importance for minors.

b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation of any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction or any articles, equipment, machines, or materials.

d) "Distribute" means to transfer possession of, whether with or without consideration.

"Knowingly" means being aware of the character of the matter.

"[O]bscenity is a matter of taste and social custom, not of fact." I. Brant, *The Bill of Rights* at 491-92 (1965), cited in, *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 136 (1973). This is so because legislatures and courts have never fully defined obscene matter, which is unprotected by the First Amendment. See *Chaplin v. New Hampshire*, 315 U.S. 568 (1942) The closest thing we have to a definition is the three part test articulated in *Miller v. California*, 413 U.S. 15 (1973).

The *Miller* test provides that a work may be banned as obscene if all three parts of the test are met. The test requires that:

1) the "average person, applying contemporary community standards" would find that "the work, taken as a whole, appeals to the prurient interest;"

2) the work "depicts or describes, in a patently offensive way; sexual conduct specifically defined by the applicable state law" and

3) the work, taken as a whole, lacks "serious literary, artistic, political, or scientific value."

*Miller v. California*, 413 U.S. 15, 24 (1973)

The difference between the Supreme Court's test and the California Penal Code may be significant, but are probably not determinative in the instant case. The statute, in fact, requires a greater showing, by those seeking to ban the material, than the Supreme Court standard.

The Supreme Court test is satisfied if "the work, taken as a whole, appeals to the prurient interest," whereas in California a work only violates the statute if the "predominant appeal" of the work, taken as a whole, is to the prurient interest. The use of the word "predominant" implies that a greater showing is required because it seems to narrow the category of "obscene" works.

Moreover, the Supreme Court seeks an absence of "serious literary, artistic, political, or scientific value," while California requires that the works be "utterly without social importance for minors." the Supreme Court expressly rejected the "utterly without redeeming social value" test in *Wards v. Illinois*, 431 U.S. 767, 769 (1977). If any value can be shown the California statute cannot consider the work "obscene," while the Supreme Court requires "serious...value," presumably something more. The "serious...value" test places a lesser burden on the prosecution and enlarges the scope of "obscene" works to include those with some value, but not "serious" value.

(Justice White, with Blackmun, Burger, Powell, and Rehnquist called the "redeeming social value" test stricter than the *Miller* standard in *Ward v. Illinois*, 431 U.S. 767, 773-774.

"Penis Landscape" is a serious painting by a valid artist, H.R. Giger. Giger won the 1980 Academy Award for special effects for the movie "Alien." Obviously, Giger is not a pornographer out to corrupt youth. However, the California court may rule that this painting has no "social importance for minors" because of the subjectivity of the evaluation and the ambiguity of the phrase.

(See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (BRENNAN, J., dissenting) "The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them. Although we have presumed that obscenity does exist and that we "know it when [we] see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (STEWART, J., concurring) (1964), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.")

*Miller* allows the states to ban only "hard core" sexual conduct. As defined within the *Miller* case, "hard core" sexual conduct is of two types: A) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated, and B) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals. *Miller v. California*, 413 U.S. 15, 25 (1973). The painting in question might conceivably fall under either type.

The California statute follows the "variable obscenity" doctrine articulated by the Supreme Court in *Mishkin v. New York*, 383 U.S. 502 (1966). See also, *Ginsberg v. New York*, 290 U.S. 629 (1968), *Ward v. Illinois*, 431 U.S. 767 (1977). The "variable obscenity" doctrine imposes a sliding scale which measures prurient appeal by its target audience. The

*Miller* standard was conceived and defined for the "average person," whereas the California statute in question deals only with minors. The Supreme Court has given states additional authority to protect children in *Ginsberg v. New York*, 390 U.S. 629 (1968). The Court has also demonstrated its protective stance in its concern over the easy access of minors to obscenity (via radio) in *FCC v. Pacifica*, 438 U.S. 726 (1978). Even Justice Brennan, perhaps the most liberal Justice on the Court, would not allow distribution of "obscene" material to minors.

("... at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the state and federal governments from attempting wholly to suppress sexually-oriented materials on the basis of their allegedly "obscene" contents." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 113 (1973).)

Given the uncertainty surrounding these vague definitions and the lack of clarity of these terms, it seems difficult to say that the work in question was "knowingly distributed." The word "knowingly" implies fair notice. Notice is questionable, in spite of *Miller's* definitions. Furthermore, how can one know the quality of the matter if it is fairly debatable. Moreover, two questions remain with respect to the word "distributes": 1) Is a voluntary purchase, with knowledge of the contents, an unlawful transfer under the law? 2) Is there a strict liability standard, whereby all who transfer possession, with or without knowledge of the contents, are guilty?

It is, partially, on these points that this case differs from similar cases. *Miller*, which deals with a similar California statute, deals with unsolicited material mailed to adults. Moreover, in most other cases, the obscene article is the "dominant" article, i.e. an obscene magazine or book. In this case the record is still selling without the poster. While it can be said that the poster was not paid for, or that it was unsolicited, it is best to view the poster as "attendant" or "appurtenant" to the record, or as part of the package sold. Simply put, it remains questionable that the "predominant appeal" of the package is to the prurient interest, when the allegedly prurient article is only a part of the package.

## Conclusion

The Dead Kennedys have always been a controversial band. In a sense, they symbolize what punk was and may still be about: challenging the status quo. Lead singer Jello Biafra, who finished fourth in the 1981 San Francisco mayoral race, is one of the most intelligent and politically aware people in rock. This time, however, he may have gone too far.

"No one expected this," said defendant Ruth Schwartz when contacted by telephone. I surmise Jello Biafra did, not only because this act jibes with past behavior but because this would be the crowning achievement in the art of confrontation. This poster and the facts of this case fall right between the cracks of the California statute and the current obscenity laws. As a result, there is no clear answer.

While this ambiguity may save the defendants, it will also cause a lengthy and costly proceeding. Since the defendants intend to demur, a judicial proceeding of indeterminate length will follow. Already the confiscation of company ledgers, along with some albums and miscellaneous materials, has made the carrying on of *Alternative Tentacles* (the Dead Kennedys record company) business affairs next to impossible. Jello Biafra already claims this case has had a "chilling effect" because retailers, fearful that they too might become defendants, have refused to stock the album. Furthermore, legal proceedings cost big money and, although the Dead Kennedys are one of the few independent "punk" bands who have made money, a lengthy trial would probably wipe out their savings.

A lengthy trial with several subsequent appeals is a strong likelihood. "They are using our case as a precedent for much bigger fish," Biafra says. The crusade mentality of the prosecution is best evidenced by the indictment of Salvatore Alberti, who owns the firm that assembled the album package and did not participate in "distribution" in the everyday sense of the word. Furthermore, if the prosecution truly sought all involved in "distribution" (statutorily defined as transfer of possession) why wasn't the store owner indicted for the ultimate transfer, the purchase?

How far can the court impose liability, claiming that it was foreseeable that the album would come into the hands of a minor? Can the court deem the distributors reckless for a "failure to exercise reasonable care" when they've taken precautionary steps via a warning sticker? Most of all, is this poster really obscene?

"[O]ne cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards have pronounced it so." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 92 (BRENNAN, J., dissenting) (1973). This case may very well reach the Supreme Court, however, in the neoconservative Reaganite '80s, it seems unlikely that five members of the Court, or even the California court, will take a liberal view of a poster depicting sex in a rock'n'roll album.

Special thanks to Chuck Eddy of *Spin* and Chris Morris of *Billboard* whose articles were used liberally as sources.

If you support the fight against censorship and would like to donate your time or money, write:

No More Censorship Defense Fund  
P.O. Box 11458  
San Francisco, CA 94101

## ENTERTAINMENT

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# An Open Letter From Fr. Bruce Ritter

Dear Friends,

"A lady should never get this dirty," she said.

She stood there with a quiet, proud dignity. She was incomparably dirty—her face and hands smeared, her clothes torn and soiled. The lady was eleven.

"My brothers are hungry," she said. The two little boys she hugged protectively were eight and nine. They were three of the most beautiful children I'd ever seen.

"Our parents beat us a lot," she said. "We had to leave." The boys nodded mutely. "We had to leave," one of them echoed. The children did not cry. I struggled to manage part of a smile. It didn't come off very well. The little kid looked back at me with a quick, dubious grin. I gave him a surreptitious hug. I was all choked up.

"I would like to take a shower," the lady said.

Seventeen years ago I did not know that there were thousands of runaway, abused and abandoned children like these in this country.

I learned the hard way.

One night, in the winter of 1969, six teenage runaways knocked on the door of

my apartment where I was living to serve the poor of New York's Lower East Side. Their junkie pimp had burned them out of the abandoned tenement they called "home." They asked if they could sleep on my floor. I took them in. I didn't have the guts not to.

Word of mouth traveled fast. (It does among streets kids.) The next day four more came. And kids have been coming ever since. These kids—with no place else to go—homeless, hungry, lacking skills, jobs, resources—compelled me to start Covenant House seventeen years ago. Today our crisis centers help tens of thousands of kids from all over the country—and save them from a life of degradation and horror on the streets.

Kids like the eleven-year-old lady and her brave little brother were easy to help: to place in a foster home where beautiful kids are wanted and loved, and made more beautiful precisely because they are wanted and loved.

But sadly, not all of the more than 20,000 kids who will come to Covenant House this year will be that lucky. These kids have very few options. Many of them will have fallen victim to the predators of the sex-for-sale and pornography "industry."

One of them put it to me very simply and very directly:

"Bruce, I've got two choices: I can go with a john (a customer) and do what he wants, or I can rip somebody off and go to jail. I'm afraid to go to jail, Bruce. I can't get a job . . . I've got no skills. I've got no place to live." This child is sixteen. I do not know what I would have done if I were sixteen and faced with that impossible choice.

They are good kids. You shouldn't think they're not good kids. Most of them are simply trying to survive. When you are on the street, and you are cold and hungry and scared and you have nothing to sell except yourself, you sell yourself.

There was time when I was forced to turn these kids away simply because there was no room. I can't do that anymore. I know only too well what the street has in store for a kid all alone. That is why we run Covenant House, and that is why we keep it open 24 hours a day, seven days a week—to give these kids an alternative, an option that leads to life and not death.

These kids come to us in need, from every kind of family background: boys and girls; White, Black and Hispanic; Children—sometimes with children of their

own—innocent and streetwise. They are your kids and mine. Their number is increasing at a frightening rate.

We are here for them because of you. Almost all of the money that we need to help these kids comes from people like you.

A lady should never get that dirty. And a good kid should not be allowed to fall victim to the terror of street life. As more good kids come to us, we need more help. We need yours. Won't you send whatever contribution you can?

Thanks for my (no, *our*) kids.

Peace,

Father Bruce Ritter

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IN THE  
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## Casenotes

from p. 5

commentary on the era, thereby falling under the exception for a use involving newsworthy events or matters of public interest. The defendants also argued that the First Amendment protected the use of a person's name or likeness in stage and film performances. In rejecting defendant's First Amendment claims, the court held that First Amendment protection is not absolute, specifically when dealing with the right of publicity. The court found "entertainment that merely imitates, [and] does not have a creative component of its own . . . is not protected by the First Amendment." Also, the court reasoned, if an appropriation is "continuous" and "for purposes of trade" with "[s]ome proof of benefit or gain to the defendant" the use will be in violation of the New York Civil Rights Law.

The court also upheld Apple's claim for unfair competition because "[c]ommon sense and reasonable inference from the established facts support the conclusion that there was reasonable likelihood that many viewers of Beatlemania were confused as to whether the Beatles had au-

thorized, consented or approved the Beatlemania production."

In addition, the court was satisfied that the "defendants taking or use amounted to virtually a complete appropriation of the Beatles' 'persona' at least in a qualitative sense." The production of Beatlemania was of such high quality, the court observed, "that the audience . . . in great part suspended their disbelief and fell prey to the illusion that they were actually viewing the Beatles in performance."

The court noted that evidence established that the demand for and popularity of the Beatles was so great during the mid-70's that Apple could have named its price for licensing a production such as Beatlemania. Based on this evidence, the court accepted the figure of a royalty rate of 12½% of gross as the fair market value of the right taken by the stage show and \$2 million for the right taken by the movie. The final award does not include punitive damages since defendant Leber "did rely, to some extent, upon some questionable advice from reputable law firms in New York."

The Entertainment Law Special was conceived and created by the Entertainment and Sports Law Council under the leadership of Randy Finch and Roger Kramer.

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For more information about the Entertainment and Sports Law Council contact Randy Finch or Roger Kramer.

**HAPPY HOLIDAYS  
FROM THE  
EDITORS AND STAFF  
OF  
THE ADVOCATE**



# BAR/BRI STUDENTS PASS THE BAR

## Notes

from p. 7

- <sup>15</sup> See 3 Nimmer 13.05.  
<sup>16</sup> 17 U.S.C. § 107.  
<sup>17</sup> See *The Nation*, 105 S. Ct. at 2231.  
<sup>18</sup> *Sony*, 659 F.2d 963, 970 (9th Cir. 1981), *rev'd*, 104 S. Ct. 774 (1984).  
<sup>19</sup> 3 Nimmer 13.05[A], 13-68.  
<sup>20</sup> *The Nation*, 105 S. Ct. at 2231. See also 3 Nimmer, § 13.05.  
<sup>21</sup> *The Nation*, 105 S. Ct. at 2231.  
<sup>22</sup> *New York Times v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.C.N.J. 1977). See also 3 Nimmer § 13.05.  
<sup>23</sup> 3 Nimmer § 13.05 [A][2].  
<sup>24</sup> See *Dr. Pepper Co. v. Sambo's Restaurants, Inc.*, 517 F. Supp. 1202 (N.D. Tex. 1981) (A television commercial may not be copied in another television commercial.). But see *Triangle Publications*, 626 F.2d 1171 (Photograph of cover of *Television Guide* used in advertisement for a competing guide to television viewing held to be fair use.).  
<sup>25</sup> See notes 149-153, 180-183 *infra* and accompanying text.  
<sup>26</sup> 3 Nimmer § 13.05 [A][3].  
<sup>27</sup> See *The Nation*, 105 S. Ct. 2218 (1985) (verbatim copying of 300 words out of a total of approximately 200,000 words in plaintiffs' work held not to be fair use); *Consumers Union of U.S., Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983) (verbatim copying of 29 words out of a total of 2100 words held fair use).  
<sup>28</sup> *Marcus v. Crowley*, 695 F.2d 1171 (9th Cir. 1983); *Triangle Publications*, 626 F.2d 1171 (copying of magazine cover held to be fair use, whereas copying "the essence" of the magazine, i.e. its contents, might not have been so regarded); *Roy Export Co. Establishment v. Columbia Broadcasting*

*Sys., Inc.*, 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff'd* 672 F.2d 1095 (2d Cir. 1982) (copying of one minute and fifteen seconds from plaintiff's one hour and twelve minute motion picture held qualitatively substantial so as to preclude fair use defense).

- <sup>29</sup> 3 Nimmer § 13.03 [A][2], citing *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir. 1982); *Nikanov v. Simon & Schuster*, 246 F.2d 501 (2d Cir. 1957).  
<sup>30</sup> See 3 Nimmer § 13.03 [A], n. 56 at 13-37 for cases holding minimal amounts as substantial takings.  
<sup>31</sup> 3 Nimmer § 13.05 [A][4].  
<sup>32</sup> 3 Nimmer § 13.05 [B].  
<sup>33</sup> *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964).  
<sup>34</sup> See notes 54-66 *infra* and accompanying text.  
<sup>35</sup> See M. Simensky's insightful article documenting the development of the parody doctrine *Recent Developments in Copyright Law's "Fair-Use Doctrine": A Business Approach*, N.Y.L.J. 4 (November 29, 1985), 5 (December 6, 1985), and 4 (December 13, 1985); *stet. Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Col. L. Rev. 1600 (1982).  
<sup>36</sup> See Simensky, *supra*.  
<sup>37</sup> For a historical overview of literary parodies, see L. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 Can.B. Rev. 1130 (1955).  
<sup>38</sup> 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom.*, *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam by an equally divided Court*, 356 U.S. 43 (1958).  
<sup>39</sup> 137 F. Supp. 348 (S.D. Cal. 1955).  
<sup>40</sup> 239 F.2d 532 (9th Cir. 1956).  
<sup>41</sup> *Id.* at 350.  
<sup>42</sup> *Id.*  
<sup>43</sup> 345 F. Supp. 108 (N.D. Cal. 1972), *aff'd in part rev'd in part*, 581 F.2d 251 (9th Cir. 1978), *cert. denied sub nom. O'Neil v. Walt Disney Productions*, 439 U.S. 1132 (1979).

- <sup>44</sup> 581 F.2d at 756.  
<sup>45</sup> 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).  
<sup>46</sup> *Id.* at 545.  
<sup>47</sup> *Id.*  
<sup>48</sup> *Id.* at 543. "[There is no] claim that defendants' parodies might satisfy or even partially fulfill the demand for plaintiffs' originals; quite soundly, it is not suggested that 'Louella Schwartz Describes Her Malady' might be an acceptable substitute for a potential patron of a 'A Pretty Girl Is Like a Melody.'" *Id.*  
<sup>49</sup> 623 F.2d 252 (2d Cir.) (per curiam), *cert. denied*, 379 U.S. 822 (1964).  
<sup>50</sup> *Id.*, n. 1 at 253.  
<sup>51</sup> 677 F.2d 180, 185 (2d Cir. 1981).  
<sup>52</sup> *Air Pirates* concerned the use of Walt Disney characters as unkempt hippies, taking drugs and having sex; *MCA* concerned the use of "Boogey Woogie Bugle Boy of Company 'B'" to create a bawdy parody, "Cunnilingus Champion of Company 'C'." See S. Schooner, *Obscene Parody: The Judicial Exception to Fair Use Analysis*, 14 J.Arts.Manag. & L. 69 (Fall 1985).  
<sup>53</sup> 104 S.Ct. 774 (1984).  
<sup>54</sup> 659 F.2d 963, 965 (9th Cir. 1981), *aff'd* 104 S. Ct. 774 (1984).  
<sup>55</sup> 104 S. Ct. at 792-3.  
<sup>56</sup> *Id.*  
<sup>57</sup> See *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, note 164 *supra*.  
<sup>58</sup> 105 S.Ct. 2218 (1985).  
<sup>59</sup> 723 F.2d 195 (2d Cir. 1983).  
<sup>60</sup> 105 S.Ct. at 2234, quoting 1 Nimmer § 1.10 [D], at 1-87.  
<sup>61</sup> *Id.*  
<sup>62</sup> *Id.* at 2234-5, quoting *Betamax*, 104 S.Ct. at 810.  
<sup>63</sup> *Id.*  
<sup>64</sup> *Id.*  
<sup>65</sup> 9 F.Cas 342, 348 (C.C.D. Mass. 1841) (No. 4, 901).  
<sup>66</sup> *Id.* at 348.

- <sup>67</sup> 215 U.S.P.Q. 124 (N.D. Ga. 1981).  
<sup>68</sup> *Id.* at 130.  
<sup>69</sup> *Id.* at 132.  
<sup>70</sup> 598 F. Supp. 110 (N.D. Ga. 1984).  
<sup>71</sup> "Whether or not plaintiff now exploits [the singing telegram] market, the effect of defendants' practices upon plaintiff's potential market is clear: they satisfy demand, at least in part, and create competition for plaintiff as a potential entrant." *Id.* at 118.  
<sup>72</sup> *Id.*  
<sup>73</sup> 523 F. Supp. 611 (S.D.N.Y.), *aff'd* 654 F.2d 204 (2d Cir. 1981), *on final hearing*, 530 F. Supp. 1187 (S.D.N.Y. 1982), *aff'd* 720 F.2d 231 (2d Cir. 1983). See also *Universal City Studios, Inc. v. T-Shirt Gallery, Ltd.*, 230 U.S.P.Q. 23 (S.D.N.Y. 1986).  
<sup>74</sup> 523 F. Supp. at 617.  
<sup>75</sup> 530 F. Supp. 1191.  
<sup>76</sup> 720 F.2d at 242.  
<sup>77</sup> *Id.* at 242.  
<sup>78</sup> 230 U.S.P.Q. 23 (S.D.N.Y. 1986).  
<sup>79</sup> *Id.* at 28.  
<sup>80</sup> No. 85-5888, slip op. at 6 (9th Cir. July 10, 1986).  
<sup>81</sup> *Id.* at 6, quoting *The Nation* 105 S. Ct. at 2234.  
<sup>82</sup> *Id.*  
<sup>83</sup> *Id.* at 8.  
<sup>84</sup> No. 85-5904, slip op. at 8, 9 (9th Cir. August 16, 1984).  
<sup>85</sup> *Id.* at 8.  
<sup>86</sup> *Id.* at 10.  
<sup>87</sup> *Id.* at 11.

# JD/MBA

from p. 1

voluminous, but well chosen. In addition, the Deans are very cooperative and in touch with the student body. Deans Susan Atherton and Louise Bishop are ready to help with any problem and always with a smile.

But I guess the best part of the program for me was the student body. Like the law school, the business school maintains a standard of excellence in its student body. These men and women are proven, competent professionals—doctors, bankers, engineers. Like the law school, the business school fosters a spirit of camaraderie among its people. And like the law school, the business school continually strives to improve itself. A recent article in the *New York Times* pointed out that Fordham's business school is emerging as a top national competitor in business education. For a school that was founded less than twenty years ago, such an accomplishment speaks for itself.

## Coneheads

John Gasior

Every area of human endeavor has its apologists. A favorite pastime for military-industrialists is touting the civilian "spin offs" of their endeavors. Ronald Reagan fairly glows (with Hippocratic pride, of course) while admiring the latest ophthalmologic application of "Star Wars" laser technology.

However, private sector fall out from the billions spent for defense is paltry, when compared to the vast technological wealth waiting to be tapped, waiting for the philosopher king who will apply the advanced resources of the entertainment-industrial-complex (EIC) for human good 'n plenty. Doubt not that the television/movie business has everything needed to end the trade deficit, the housing shortage, the crises in the classroom, and more.

Think what the mechanical shark from "JAWS" could do for the New York Stock Exchange. London's big bang would be laughable. My opinion, get that natural born leader out of storage at Paramount and out on the floor with the other sharks where he belongs.

And where is the alien space craft from "Close-Encounters"? That vast vessel is the answer to Mayor Koch's homeless person problem. There must be room to house several hundred thousand individuals in there. Get Spielberg on the horn and Federal Express that thing out here, pronto.

It is in the educational arena that EIC technology holds the greatest promise. Right here at Fordham Law there are resources crying out for EIC "spin-off" hardware. Who has not remarked on the acoustic qualities of the library, particularly the main floor? I have no doubt the noise level therein is the result of an unfor-

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## Ventilate Those Frustrations Away

by Michael Goldberger

During my first year, I was one of the few students to use the new top floor of the library, a small, well lit room now known as "S7." At that time it was simply "the attic." The white noise generated by the rumbling of the ventilation plant made the attic a particularly pleasant place to work. Like clockwork, though, the noise would cease at 9:37 each weekday night.

The primary advantage of the attic, however, was its proximity to the ventilation systems. As long as the system was on, the room remained comfortable. On weekends, however, no such luxury as adequate ventilation was offered. The system was shut down on Friday and not resumed until Monday.

Most students sought more comfortable places outside the library to study and this appears to be the case this year. Despite the annual complaints from students, the library is still impossibly oppressive on weekends.

This is not necessarily a request for air conditioning, although that would alleviate the problem, but the lack of any

circulation, whether it comes from an air conditioning unit or an open window, makes it difficult to concentrate on one's studies.

As the semester ends, the library crowds with students catching up on assignments, researching, footnoting and studying. More bodies generate more heat. The need for ventilation increases.

Although the library is generally comfortable during the week, it is unbearable on weekends. Students, unfortunately, don't stop working on weekends. If at any time, library use probably peaks on Saturday afternoons. Why can't the ventilation system work on weekends as well as during the week. This is not a simple matter of comfort. The students at Fordham are entitled to library atmosphere conducive to study.

Students, faculty and administration are sensitive to the economic argument against round-the-clock ventilation, but this issue should not be decided upon efficiency considerations. The library environment affects a student's ability to perform. For over \$9,000 a year, we deserve adequate ventilation.

tunate engineering design flaw whereby voices are magnified by the juxtaposition of the walls and ceiling.

The remedy to this unfortunate situation is available, thanks to EIC know-how. I refer to the cone of silence once used in the television cold war satire "GET SMART". This amazing device could turn the aural nightmare Fordham's library has become into the academic Elysium it should be. For those who are not familiar with the cone, it was a dome shaped device made of a clear glass or plastic, large enough to cover a conference table, which when lowered from the ceiling, rendered conversations around the table inaudible to anyone outside the cone.

Hollywood must have produced many back-up cones for the GET SMART series. All the available cones could be rounded up and installed above a carrel in the library. Then, with the push of a button, blissful silence as your own personal cone floats down from above enveloping you in an environment conducive to academic excellence, safe from the rude torture of a library whose acoustic design baffles the mighty.

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## Fordham-Stein Prize Awarded

(November 13, 1986) Shirley M. Hufstедler, a lawyer practicing in Los Angeles, has been selected as the 1986 Fordham-Stein Prize recipient, an honor given for outstanding standards of professional conduct. Mrs. Hufstедler is the first woman to receive this national award.

In making the announcement Dean Jon D. Feerick noted "Judge Hufstедler has earned a reputation as an articulate, compassionate advocate and public servant and as a brilliant and courageous jurist. She is an exemplar of the best of the American legal profession."

Mrs. Hufstедler was the first Secretary of the United States Department of Education, appointed by President Jimmy Carter in 1979. Prior to that time she had served as an appellate judge on the California State Court of Appeals and on the United States Court of Appeals for the Ninth Circuit.

The Fordham-Stein Prize is presented each year to an attorney who has displayed outstanding standards of professional conduct and whose career "brings credit to the profession by emphasizing in the public mind the contributions of lawyers to our society." The Prize has been presented each year since 1976 and has been received by such distinguished attorneys as Professor Archibald Cox of Harvard Law School; Warren Christopher, who negotiated the release of the American hostages in Iran; Justice Potter Stewart and former Chief Justice Warren Burger of the U.S. Supreme Court and Edward Bennett Williams, the highly regarded trial lawyer.

Selection is made by a committee of academics, layers, bar officials and judges. Nominations are received for attorneys throughout the country. Over 65 nominations were considered for this year's Prize.

The Prize includes an honorarium and a specially designed crystal sculpture from Tiffany & Co. The presentation was made at a ceremony held at the Hotel Pierre in New York on Monday, November 17, 1986.



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